

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

OWCP accepted that on November 22, 2010 appellant, then a 40-year-old plumber supervisor, sustained a closed right ankle fracture and dislocation when he twisted his right leg and ankle while throwing a valve into a dumpster.

On December 6, 2010 appellant underwent open reduction and internal fixation of a right medial malleolar fracture, trans-syndesmotic fixation of the right tibiofibular joint, and reconstruction of the right superficial deltoid ligament, approved by OWCP. Dr. Robert Zura, an attending Board-certified orthopedic surgeon, held appellant off work. He received continuation of pay through January 6, 2011, followed by compensation on the periodic rolls. Appellant returned to sedentary duty on March 7, 2011. Imaging studies revealed that the fixation screws had broken. Dr. Zura operated to remove them on June 16, 2011.

On October 17, 2011 appellant claimed a schedule award (Form CA-7). He returned to full duty on December 17, 2011.

In a December 27, 2011 report, Dr. Zura diagnosed residual stiffness and early arthritis of the right ankle. He opined that appellant had attained maximum medical improvement.

By decision dated August 22, 2012, OWCP granted appellant a schedule award for 19 percent permanent impairment of the right lower extremity.² The period of the award ran from January 10, 2012 to January 27, 2013 for a total of 54.72 weeks.

On October 9, 2013 appellant filed a notice of recurrence of disability (Form CA-2a) commencing September 25, 2013. He asserted that post-traumatic arthritis of the right ankle caused difficulties walking, crouching, and crawling. Appellant described chronic pain and a popping sensation with prolonged standing. Appellant's supervisor confirmed that appellant had returned to full duty.

In a letter dated November 26, 2013, OWCP advised appellant of the additional evidence needed to establish his claim for recurrence of disability. It afforded him 30 days to submit such evidence. Appellant did not submit additional evidence prior to January 9, 2014.

By decision dated January 9, 2014, OWCP denied appellant's claim for recurrence of disability, finding that he had not established total disability for work due to a material change or worsening of the accepted right ankle injury.

In a January 16, 2014 letter, counsel requested a telephonic hearing, held before an OWCP hearing representative on July 16, 2014. At the hearing, appellant explained that he had not stopped work, but requested authorization for ongoing medical treatment of his right foot and ankle. He submitted additional medical evidence.

² OWCP initially denied appellant's schedule award claim by decision dated February 16, 2012. Pursuant to an oral hearing, counsel submitted a June 14, 2012 impairment rating by Dr. William C. Daniels, a Board-certified orthopedic surgeon, who assessed 19 percent impairment of the right lower extremity due to the accepted right ankle injury. Following additional development, an OWCP hearing representative vacated the February 16, 2012 decision on August 20, 2012, and approved the claim for a schedule award, which was issued on August 22, 2012.

In a January 20, 2014 report, Dr. John D. Hewitt, an attending Board-certified orthopedic surgeon, obtained x-rays showing anterior osteophyte formation and mild joint space narrowing in the right ankle. He diagnosed post-traumatic arthritis of the right ankle related to the accepted injury and surgeries. Dr. Hewitt released appellant to full duty, but noted that he should participate in self-defense training only as tolerated.

In a March 3, 2014 report, Dr. David W. Boone, an attending Board-certified orthopedic surgeon, provided a history of injury and treatment. He diagnosed post-traumatic arthritis of the right ankle causally related to the accepted injury and surgeries.

By decision dated September 3, 2014, the OWCP hearing representative affirmed the January 9, 2014 decision, finding that the medical evidence submitted was insufficient to establish causal relationship.

On August 14, 2015 counsel requested reconsideration. He submitted June 18 and July 13, 2015 work restriction forms from Dr. Viens Nicholas, an attending Board-certified orthopedic surgeon. Counsel also provided a July 8, 2015 magnetic resonance imaging scan of the right ankle showing degenerative arthritis.

By decision dated December 7, 2015, OWCP denied reconsideration. It found that the work restriction forms and imaging study did not contain medical rationale addressing the critical issue of causal relationship.

LEGAL PRECEDENT

To require the office to reopen a case for merit review under section 8128(a) of FECA,³ section 10.606(b)(3) of Title 20 of the Code of Federal Regulations provides that a claimant must: (1) show OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) submit relevant and pertinent new evidence not previously considered by OWCP.⁴ Section 10.608(b) provides that when an application for review of the merits of a claim does not meet at least one of the three requirements enumerated under section 10.606(b)(3), OWCP will deny the application for reconsideration without reopening the case for a review on the merits.⁵

In support of a request for reconsideration, appellant is not required to submit all evidence which may be necessary to discharge his burden of proof.⁶ He need only submit relevant, pertinent new evidence not previously considered by OWCP.⁷ When reviewing an OWCP decision denying a merit review, the function of the Board is to determine whether

³ 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.606(b)(3).

⁵ *Id.* at § 10.608(b). *See also D.E.*, 59 ECAB 438 (2008).

⁶ *Helen E. Tschantz*, 39 ECAB 1382 (1988).

⁷ *See supra* note 4. *See also Mark H. Dever*, 53 ECAB 710 (2002).

OWCP properly applied the standards set forth at section 10.606(b)(3) to the claimant's application for reconsideration and any evidence submitted in support thereof.⁸

ANALYSIS

Appellant, through counsel, requested reconsideration on August 14, 2015. Counsel provided June 18 and July 13, 2015 work restriction forms from Dr. Nicholas, an attending Board-certified orthopedic surgeon, and the July 8, 2015 imaging study. OWCP denied reconsideration by December 7, 2015 decision, finding that the evidence submitted on reconsideration was irrelevant to the critical issue of causal relationship.

The Board finds that OWCP appropriately denied reconsideration as the submitted work restriction forms are not relevant to the claim. The critical issue was the medical question of whether the accepted right ankle injury had worsened such that appellant was disabled from work. Because the work restriction forms and imaging study did not address the cause of his condition, they are irrelevant to the recurrence claim. Therefore, they do not comprise a basis for reopening the case.⁹

A claimant may be entitled to a merit review by showing that OWCP erroneously applied or interpreted a specific point of law, by advancing a relevant legal argument not previously considered, or by submitting pertinent new and relevant evidence not previously considered. Appellant did not do so in this case. Therefore, pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

On appeal, counsel asserts that OWCP's December 7, 2015 decision was illogical. As set forth above, appellant did not submit evidence warranting a review of his claim on the merits.

CONCLUSION

The Board finds that OWCP properly denied appellant's requests for further merit review of his claim pursuant to 5 U.S.C. § 8128(a).

⁸ *Annette Louise*, 54 ECAB 783 (2003).

⁹ *Joseph A. Brown, Jr.*, 55 ECAB 542 (2004) (the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 7, 2015 is affirmed.

Issued: June 16, 2016
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board